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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-377

NEW JERSEY MANUFACTURERS INSURANCE COMPANY,

Petitioner,

vs.

MOTOR CLUB FIRE & CASUALTY CO. and FRANCES SCIBETTA,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF THE CASE	2
ARGUMENT:	
Point I—The United States Supreme Court will not consider issues not raised in the courts below	2
Point II—N.J.S.A. 39:6-46 did not impair petitioner's contract of insurance	3
Point III—Petitioner has not been deprived of due process or equal protection of the laws	4
CONCLUSION	7

Cases Cited

Home Building and Loan Ass'n v. Blaisdell, 290 U.S. 398, 78 L. Ed. 413 (1934)	4
Matits v. Nationwide Mutual Ins. Co., 33 N. J. 488 (1960)	3
Monks v. New Jersey, 398 U.S. 71, 26 L. Ed. 2d 54 (1970)	2
Odolecki v. Hartford Accident and Indemnity Co., 55 N. J. 542 (1970)	3
Ogden v. Sanders, 12 Wheat 213 (1827)	4
Selected Risks Ins. Co. v. Zullo, 48 N. J. 362 (1966)	3
State v. Laganella, 144 N. J. Super. 268 (App. Div. 1976)	6
Street v. New York, 394 U.S. 576, 22 L. Ed. 2d 572 (1969) on remand 250 N.E. 2d 250, 24 N.Y. 2d 1026	2

PAGE

United States Constitution Cited

Article I, Section 10, Clause 1 3

Statute Cited

N.J.S.A. 39:6-46 ..... 2, 3

Rule Cited

R. 2:11-6 5

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BRIEF IN OPPOSITION

Respondent, Motor Club Fire & Casualty Co. (hereinafter designated as MCA) files the within Brief in opposition to the Petition for a Writ of Certiorari of petitioner, New Jersey Manufacturers Insurance Company (hereinafter NJM).

Counter-Statement of the Case

Petitioner's statement of the case is substantially correct. Any required amplification or modification of the facts is stated in the Argument following.

ARGUMENT

POINT I

The United States Supreme Court will not consider issues not raised in the courts below.

Counsel for petitioner has vigorously prosecuted its appeal from the Judgment of the Trial Court and through the Appellate Courts of New Jersey. At no time, however, did petitioner ever advance the arguments here predicated as the very basis for the jurisdiction of this Court and as questions for review, namely, the alleged unconstitutionality of N.J.S.A. 39:6-46 and its deprivation of due process.

It is well settled that a petitioner cannot raise issues for the first time on its application for a Writ of Certiorari, since the State courts had had no opportunity to pass upon them. *Monks* v. *New Jersey,* 398 U.S. 71, 26 L. Ed. 2d 54 (1970).

Where, as in the case at bar, the highest state court has failed to pass upon the federal question asserted, it will be assumed that the omission was due to the want of proper presentation in the state courts and this Court would not consider the issue. *Street* v. *New York,* 394 U.S. 576, 22 L. Ed. 2d 572 (1969) on remand 250 N.E. 2d 250, 24 N.Y. 2d 1026. By reason thereof, petitioner's writ is not entitled to consideration on the merits, but even if so considered, is without merit and should be denied.

POINT II

N.J.S.A. 39:6-46 did not impair petitioner's contract of insurance.

At page eight of its Brief, NJM asserts N.J.S.A. 39:6-46 violated the contract clause of the United States Constitution, Art. I, § 10, cl. 1 and thereby required the *wrong* insurance carrier to pay a substantial judgment.

Those assertions indicate a complete misconception not only of the contract clause of the Constitution, but also of the issues involved in this case.

In the first place, the Courts below were not concerned with the fact that there were two insurance carriers in this particular case. They had to deal with the issue of petitioner's coverage of Nick Scibetta as if its policy were the only one involved, because in the next case to arise on point, there might in fact be only one policy. The fact that the MCA policy was available as excess insurance was not seized upon by any of the Courts below as an easy way to avoid resolution of the primary question of the coverage afforded by NJM.

Moreover, counsel overlooks the basic fact that the statute was enacted in 1952, long before this policy of insurance was issued to Mrs. Leonard in 1971. In the interim, the statute had been construed by New Jersey's highest Court in numerous cases and the state law had been well settled that where a policy of insurance did not comply with the requirements of the statute, it would be deemed to be amended so as to conform therewith. *Matits* v. *Nationwide Mutual Ins. Co.,* 33 N. J. 488 (1960), *Odolecki* v. *Hartford Accident and Indemnity Co.,* 55 N. J. 542 (1970), *Selected Risks Ins. Co.* v. *Zullo,* 48 N. J. 362 (1966).

Manifestly, a contract made long after the enactment of a statute would not be impaired by that statute within the

constitutional mandate. Quite the contrary, contracts entered into after enactment of a statute are subject to that law. That has been firmly established ever since it was articulated in the classic case of *Ogden* v. *Sanders,* 12 Wheat 213 (1827) which held that contracts entered into after enactment of a law were not only subject to the law, but would be interpreted as though the law were "a part of" that contract. Similar language is found in *Home Building and Loan Ass'n* v. *Blaisdell,* 290 U.S. 398, 78 L. Ed. 413 (1934).

Accordingly, when NJM issued its policy of insurance in 1971 which contained an omnibus clause more restrictive than the language mandated by the statute, it was aware (or should have known) that its contract was subject to being modified by judicial determination if its chosen language did not comply with that required by the then existing statutory mandate.

By reason thereof, there has been no unconstitutional impairment of petitioner's contract.

POINT III

Petitioner has not been deprived of due process or equal protection of the laws.

On page 11, counsel for petitioner referred to the petition for reargument below as ". . . a meritless, emotional petition for rehearing, grounded *solely* on the fact that the Supreme Court opinion was rendered by six rather than seven justices. . . ." Manifestly, the highest court in New Jersey did not share counsel's characterization, nor is counsel's statement factually correct.

When this case was first called for argument before the Supreme Court of New Jersey, the Chief Justice was

absent because he had disqualified himself. (Apparently because he had previously been a member of the law firm representing NJM).

As counsel correctly states, a hearing by less than a total complement of justices is commonplace in Appellate Court and no objection was made at the time. However, when the Judgment of the Appellate Division was affirmed because the Supreme Court had divided evenly (3-3) on the issues, we applied for reargument on the basis that the question at bar should not be decided by the position of the case at the time the State Supreme Court took jurisdiction thereof. Pursuant to the rules of Appellate procedure of New Jersey, the Supreme Court could have certified the case directly to itself while it was pending unheard in the Appellate Division. If that procedure had been invoked in the case at bar, the resulting division of the Supreme Court would have resulted in the affirmance of the Judgment of the trial court which had previously held against NJM.

The State Supreme Court does not issue opinions on the grant or denial of petitions for rehearing, so that we cannot state with certainty the basis for the grant of rehearing. But the rehearing was allowed.

Certainly, the allowance of rehearing cannot be considered as violating petitioner's rights. The very rules of appellate procedure of New Jersey anticipate and provide the procedure for such action (R. 2:11-6). Moreover, the rules not only contemplate but specifically provide that where appropriate, the Court may summarily redetermine the appeal or amend its opinion.

In this case, the State Supreme Court followed the established practice of designating the senior Judge of the Appellate Division then available to fill the vacancy cre-

ated by the self-disqualification of the Chief Justice. Hence, upon the grant of rehearing at bar, the Supreme Court designated Judge Carton to act as the seventh Justice.

Significantly, there was no objection by NJM to the designation of Judge Carton and the matter was reargued before the Court as thus constituted. Upon reconsideration of the matter, Justice Sullivan (who had previously voted to affirm) voted to reverse the Judgment of the Appellate Division, as did Judge Carton.

Hence, the State Supreme Court thereby reversed its prior holding by a vote of five-two and held, as the trial court did originally, that the policy of NJM afforded coverage to Nick Scibetta. Understandably, while petitioner may have thereby been disgruntled and upset over the result, there was no violation of due process or equal protection of the laws as claimed in its petition for certiorari.

As stated succinctly in *State* v. *Laganella,* 144 N. J. Super. 268 (App. Div. 1976) "due process" in its constitutional sense is little more than metonym for fair play. Certainly there was no absence of fair play in the case at bar. All litigants had received fair and equal treatment. They had had the notice required together with an opportunity to be heard. They were heard, but petitioner did not prevail. By deciding against NJM, it cannot be said that the State Supreme Court thereby deprived the petitioner of its constitutional rights of due process and equal protection of the laws. But, in the final analysis, that is all petitioner has shown as alleged justification for its petition for a writ of certiorari.

CONCLUSION

Wherefore, we respectfully submit that petitioner's application for a Writ of Certiorari be denied.

Respectfully submitted,

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